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No. 01-1428

In the Supreme Court of the United States

THE TAYLOR GROUP, AN INDIANA GENERAL PARTNERSHIP, ET AL.,
Petitioners,

v.

ANR STORAGE COMPANY, A MICHIGAN CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT ANR STORAGE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Taylor Group misstates both questions presented to the Court by the Petition. The applicable and controlling state law does not require a judgment "on the merits" as an element of collateral estoppel, as assumed in the phrasing of the first question. More properly stated, the first question raised by the Taylor Group's Petition is:

> Whether controlling state law holds that a prior judgment on the merits is an element of collateral estoppel (issue preclusion) and, if so, whether the federal court erred in not recognizing that element.

The federal court did not deny Plaintiff's Motion to Amend solely on the basis of duplicative discovery, as assumed in the phrasing of the second question. More properly stated, the second question is:

> Whether the federal court abused its discretion in denying Plaintiff's motion for leave to file an amended complaint where leave to amend had been granted several times in the past, where the amendment proposed to add parties who had been voluntarily dismissed in the past, where duplicative discovery would have been necessary, and where a material witness has died during the delay in seeking leave to amend.

PARTIES TO THE PROCEEDINGS

To the best of Respondent ANR Storage Company's knowledge, information and belief, Petitioners have correctly listed the parties.

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OPINIONS BELOW

Taylor Group has correctly listed and cited the opinions and orders entered in this case which were appealed.

In addition, the R.49 district court's June 2, 1995 Opinion, reproduced at App M.1a, the R.118 transcript of the Kalkaska County Circuit Court decision dated August 22, 1997, Case No. 93-4776-NZ(M), reproduced at App N.1a, and the unpublished decision of the Michigan Court of Appeals affirming that dismissal dated July 13, 1999, reproduced at App O.1a, should have been included pursuant to Supreme Court Rule 14.1(i)(ii).

JURISDICTION

Respondent ANR Storage Company acknowledges that this Court has jurisdiction by virtue of the statutes relied upon by Taylor Group.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The statement of facts in the Petition for Writ of Certiorari, pages 2-5, purporting to describe the underlying mineral sale transaction between Plaintiffs (hereinafter "Taylor Group") and Defendant ANR Storage Company (hereinafter "ANR"), does not accurately set out the facts material to the consideration of the questions presented. Rather, Taylor Group has repeated and exaggerated the allegations made in its complaints, which are not supported by the record. Taylor Group also omits facts which are adverse to the Taylor Group and on the basis of which the state trial court granted summary disposition (the equivalent of Rule 56 summary judgment) in favor of ANR. ANR continues to vigorously dispute Taylor Group's allegations and characterization of ANR's offer to purchase, particularly with regard to the claim that ANR made fraudulent misrepresentations.

While the details regarding the 1983 sale of property owned by Taylor Group to ANR are not critical to the decision whether or not to grant this Petition for Writ of Certiorari, some background facts may be helpful to understand what was alleged, litigated and decided in the state and federal trial and appellate courts.

In approximately 1970, a group of people who are, or were, faculty members at or otherwise affiliated with Taylor University in Indiana formed a partnership called the Taylor Group and purchased recreational property in Blue Lake Township, Kalkaska County, Michigan for $30,000. Shortly thereafter, the Blue Lake 18A natural gas field was discovered under the Taylor Group's and adjoining properties. Soon

Taylor Group was receiving about $40,000 per month in natural gas and condensate royalty. The original Taylor Group partners assigned some of their interest to the remaining Plaintiffs for tax purposes. As the Blue Lake 18A gas field neared depletion, ANR became interested in the possibility of using the reservoir as a "husbanding" storage reservoir where gas which ANR was forced to purchase under long-term high-priced "take or pay" contracts (but could not pass on to its customers under Federal Energy Regulatory Commission ("FERC") Order) could be injected and stored during the period of over-supply, to be retrieved later when market conditions permitted.

In early 1983, ANR filed an application with FERC for approval of this project. At the same time, pursuant to the requirements of the Michigan Uniform Condemnation Procedures Act, ANR calculated what it believed was the market value of the mineral rights it sought to acquire and mailed written offers to the land owners, including Taylor Group. The offers disclosed the assumptions ANR used to calculate the just compensation offered. Taylor Group reacted to the offer by seeking the advice of its gas well operator, Amoco Production Company, as well as the advice of Peninsular Oil Company president-geologist George McAlleenen, the chief executive of its oil and gas lessee. Both Amoco and Mr. McAlleenen assured Taylor Group that the offer from ANR was "a good one." Taylor Group owned the property involved in the purchase and sale transaction, had access to all of the production records and other documentation related to the property and could have conducted tests or any other investigation. Taylor Group also had the sophistication and the financial wherewithal to conduct a thorough evaluation of ANR's offer before accepting it. Ultimately, Taylor Group accepted the offer and received payment in Spring, 1983.

After ANR had acquired some (including the Taylor Group's) mineral interest in the storage formation, ANR's plans to convert the natural gas field to a "husbanding" storage facility were indefinitely put on hold because the FERC declined to approve the project. About eight years later, ANR tried again to acquire FERC approval to convert the field to a typical cyclical storage field and, this time, the application was granted.

In 1991, Taylor Group apparently became aware that ANR was negotiating with the remaining mineral rights interest holders and, for the first time, complained that ANR should have calculated its 1983 offer price differently by attributing additional value to the condensate in the field which could have been expected to be recovered as an adjunct to later cyclical storage operations.

Taylor Group asserts that it is important for the Court to understand retrograde versus non-retrograde gas condensation. ANR does not agree. It is only important that Taylor Group made the same allegations about the value of recoverable gas condensate in both the state and federal lawsuits and that the state court recognized that the physical attributes of the field owned by Taylor Group at the time ANR made its purchase offer (and at the time Taylor Group accepted the offer) were not misrepresented to or hidden from Taylor Group by ANR or anyone else.

B. COURSE OF PROCEEDINGS

The Petition fairly accurately describes the proceedings that occurred in the state and federal trial and appellate courts prior to the state and federal appellate remands to the trial courts in 1996. Taylor Group gives short shrift, however, to the succeeding events at the state court

level. After the case was reinstated, Taylor Group conducted extensive discovery in the state and federal court proceedings.[1] Shortly before the scheduled state court trial, ANR filed another motion for summary disposition. The grounds for the motion included the statute of limitations[2] and Taylor Group's inability to prove that there was reasonable reliance upon any statement of fact made by ANR. On August 22, 1997, the Kalkaska County Circuit Court granted ANR's motion for summary disposition on these and other grounds and rendered an extensive opinion with specific findings and conclusions. The opinion is reproduced in Appendix N to this Brief.

ANR again moved for summary judgment in the federal district court based on the state court's September 16, 1997 dismissal order entered pursuant to the August 22, 1997 bench opinion. The district court granted summary judgment to ANR on May 7, 1998 on the basis of *res judicata*.

Meanwhile, Taylor Group appealed the state court judgment to the Michigan Court of Appeals. After the district court granted summary judgment to ANR, the Michigan Court of Appeals affirmed the state trial court on the basis of the statute of limitations only. The Court of Appeals did not reach the alternate grounds. A copy of the Michigan Court of Appeals decision is reproduced in Appendix O of this Brief. Taylor Group applied for leave to the Michigan Supreme Court, which denied leave.

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[1] Pursuant to the federal district court's R.6, Joint Status Report, p. 4, the parties stipulated to the use of state court discovery in the federal court case.

[2] The alleged misrepresentations were made in 1983 and the suit was not filed in state court until 1993.

The Sixth Circuit concluded that when the state court judgment was affirmed solely on the basis of the statute of limitations, it lost its preclusive effect for purposes of *res judicata* under Michigan law. Accordingly, *res judicata* did not bar Taylor Group's RICO action in federal court. App. A-6, 7.

However, the Sixth Circuit affirmed the district court on the alternative ground of collateral estoppel. The Sixth Circuit determined that the elements of collateral estoppel under Michigan law are (a) the issue in the second action must be the same issue as in the first action; and (b) the issue in the first action must have been essential to the resulting judgment. App. A-8. The Sixth Circuit specifically determined that unlike *res judicata*, a prior judgment on the merits is not an element of collateral estoppel under Michigan law. App. A-8. After a close reading of the Michigan Court of Appeals' opinion, the Sixth Circuit determined that the following issues were actually litigated and necessarily determined by the state trial court and appellate courts in finding that the statute of limitations barred Taylor Group's claim: (1) Taylor Group did not reasonably rely on ANR's alleged fraudulent representations and (2) Taylor Group, through the exercise of reasonable diligence, should have discovered that they had a fraud claim[3] against ANR in June, 1983.

The Sixth Circuit therefore held that as a matter of collateral estoppel (1) Taylor Group cannot show an essential element of their RICO claims – that they reasonably relied on

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[3] The district court held that Taylor Group's state law fraud and RICO claims are based on the same cause of action – defendant's allegedly fraudulent representations to them. App. D-3. This finding has not been appealed.

ANR's alleged fraudulent conduct and (2) the four-year RICO statute of limitation expired by June 1987, four years after Taylor Group, through the exercise of reasonable diligence, should have discovered its cause of action against ANR. Taylor Group filed its RICO claim in federal district court in 1994.

The only aspect of the Sixth Circuit's collateral estoppel ruling challenged by Taylor Group is the holding that a prior judgment on the merits is not a necessary element of collateral estoppel under controlling Michigan law.

These same arguments were presented to the Sixth Circuit in Taylor Group's Petition for Rehearing which was denied by Order dated December 20, 2001.

ARGUMENT

I. THE PETITION FOR WRIT OF CERTIORARI DOES NOT SET FORTH ANY COMPELLING REASON FOR GRANTING THE PETITION

A petition for writ of certiorari will be granted only for compelling reasons, the character of which are indicated in U.S. Supreme Court Rule 10(a)-(c). The Sixth Circuit Court of Appeals' affirmance of the district court's grant of summary judgment, applying Michigan collateral estoppel law, does not conflict with a decision of another United States Court of Appeals and does not even decide a federal question, taking its decision outside the purview of Rule 10(a)-(c). Nor did the Sixth Circuit Court of Appeals, in affirming the district judge's denial of Taylor Group's motion to amend, sanction such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the United States Supreme Court's supervisory power under Rule 10(a).

While the reasons listed in Rule 10 do not control or fully measure this Court's discretion, the reason asserted in the Petition for Writ of Certiorari do not even begin to approach the character of the reasons outlined in that Rule.

II. NEITHER THE DISTRICT COURT NOR THE SIXTH CIRCUIT COURT OF APPEALS COMMITTED ANY ERROR

A. THE SIXTH CIRCUIT CORRECTLY DETERMINED THAT A JUDGMENT "ON THE MERITS" IS NOT A REQUIRED ELEMENT OF COLLATERAL ESTOPPEL (ISSUE PRECLUSION) UNDER MICHIGAN LAW

The fundamental error that underlies the Taylor Group's argument in support of its petition is an attempt to elevate an imprecisely worded footnote into a change in Michigan law. No authority supports that position or result.

1. *Res Judicata* And Collateral Estoppel Are Different Concepts With Different Elements Under Michigan Law

The courts of the State of Michigan have long and consistently recognized that *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) are not the same thing. As recently explained by the Michigan Supreme Court in *Sewell v. Clean Cut Management, Inc.*, 463 Mich. 569, 575; 621 N.W.2d 222 (2001), quoting *Dart v. Dart*, 460 Mich. 573, 586; 597 N.W.2d 82 (1999):

"Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. *Eaton Co. Bd. of Co. Rd. Comm'rs v. Schultz*, 205 Mich. App. 371, 375; 521 N.W.2d 847 (1994). A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies, *id.* at 375-376.

Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not, *Gose v. Monroe Auto Equipment Co.*, 409 Mich. 147, 160-163; 294 N.W.2d 165 (1980); *Sprague v. Buhagiar*, 213 Mich. App. 310, 313; 539 N.W.2d 587 (1995)."

In contrast to *res judicata*, the Michigan Supreme Court explained in *People v. Gates*, 434 Mich. 146, 154; 452 N.W.2d 627 (1990) that the doctrine of collateral estoppel "precludes re-litigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined.[7]"

Footnote 7

[7]"We use the term 'collateral estoppel' to refer to issue preclusion. This Court

generally uses the term 'res judicata' to refer to what is often called 'claims preclusion,' which covers the preclusive effect of a judgment upon a subsequent proceeding on the basis of the same cause of action." *Jones v. Chambers*, 353 Mich. 674; 91 N.W.2d 889 (1958).

End Footnote 7

2. *Qualls* Did Not Add An "On The Merits" Element To Collateral Estoppel

About a month after *People v. Gates*, *supra*, was decided, the Michigan Supreme Court issued its decision in the *City of Detroit v. Qualls*, 434 Mich. 340; 454 N.W.2d 374 (1990). In that case, the Michigan Supreme Court opinion included a footnote on the issue of whether collateral estoppel arises from summary judgment as well as from judgment after trial. Taylor Group argues that the Michigan Supreme Court used this footnote to add a third collateral estoppel element to the two elements announced a month earlier in *People v. Gates, supra*. The Michigan Supreme Court's holding does not support Taylor Group's argument.

Part II of the *Qualls* decision starts with the following sentence:

> "While we agree with the dissent that the defendant was not precluded from raising the issue whether the ordinance was valid in 1984, we disagree with the basis for the dissent's conclusion, that is, that a ruling made on a summary disposition motion[27] in a forfeiture proceeding, by its very nature, cannot have a

binding effect. There is no support for the application in this case of the proposition that the nature of the prior proceeding prevents application of estoppel in the subsequent suit." (Footnotes 28 and 29 omitted)

Footnote 27

[27]A judgment is considered a determination of the merits, and thereby triggers the doctrine of collateral estoppel on re-litigation, even if the action has been resolved by a summary disposition, *see e.g.*, *Detroit v. Nortown Theatre, Inc.*, 116 Mich. App. 386; 323 N.W.2d 411 (1982). In fact, "[it] would be strange indeed if a summary judgment could not have collateral estoppel effect. This would reduce the utility of this modern device to zero. . . . Indeed, a more positive adjudication is hard to imagine." Thus, it is not surprising that the dissent fails to cite any legal authority whatsoever to support this strange contention, and we believe the Court should continue to recognize that, for purposes of collateral estoppel, a ruling rendered on a summary judgment motion will be considered a final disposition on the merits.

End Footnote 27

In this context, responding to a particular point made in the dissent, the Michigan Supreme Court majority opinion in *Qualls* continues by reaffirming the long-established requirements for collateral estoppel as follows:

"Appropriate resolution of the collateral estoppel question turns not on whether the inquiring court characterizes the first proceeding as summary, but rather upon a finding that in the prior proceeding the issue of fact or law was actually litigated and actually determined by a valid and final judgment, and that the determination was essential to the final judgment.[30] 1 Restatement Judgments, 2d § 27, p. 250. Among the requirements courts have set out in order that collateral estoppel may apply are the following:

> The issue to be concluded must be the same as that involved in the prior action. In the prior action, the issue must have been raised and litigated, and actually adjudged. The issue must have been material and relevant to the disposition of the prior action. The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. [1B Moore, Federal Practice, ¶ 0.443[1], p. 759.]"

Footnote 30

[30]It is a flexible judge-made rule generally said to have three purposes: To 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication,' *Allen v.*

McCurry, 449 U.S. 90, 94; 101 S. Ct. 411; 66 L. Ed. 2d 308 (1980).

End Footnote 30

A contextual reading of the *Qualls* majority opinion reveals that the elements necessary to establish collateral estoppel were not changed by the Michigan Supreme Court in footnote 27 of that decision. Rather, the case stands for the proposition that an issue may have been raised, litigated and actually adjudged in an action decided by motion, thus warranting collateral estoppel effect. The fact that a decision on motion is "on the merits" is no more than one way of determining whether or not an issue was so involved in the decision.

3. No Other Precedential Michigan Authority Adds An "On The Merits" Requirement

Numerous recent published decisions by the Michigan Court of Appeals have cited *Qualls* and have repeated the elements of the doctrine of collateral estoppel listed in *Qualls* without adding a new requirement that the decision also be "on the merits." Most recently, *Dearborn Heights School District v. Adis,* 233 Mich. App. 120, 125; 592 N.W.2d 408 (1998), held that "the doctrine of collateral estoppel precludes re-litigation of a issue in a different, subsequent action between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding" citing *People v. Gates, supra*, as well as *Qualls*. *Bullock v. Huster*, 209 Mich. App. 551, 556; 532 N.W.2d 202 (1995), vacated on other grounds 451 Mich. 884; 549

N.W.2d 573 (1996), cited *Qualls* among other cases, and held:

> "[c]ollateral estoppel precludes re-litigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceedings. . . . The ultimate issue in the second action must be the same as that in the first. . . . The issue must have been necessarily determined - that is, essential to the resulting judgment - in the first action. . . . It must also have been actually litigated - that is, put into issue by the pleadings, submitted to the trier of fact, and determined by the trier of fact. . . . The parties must have had a full and fair opportunity to litigate the issue in the first action." [Citations omitted]

See also Radtke v. Miller Canfield, Paddock & Stone, 209 Mich. App. 606, 621; 532 N.W.2d 547 (1995) rev'd on other grounds 453 Mich. 413; 551 N.W.2d 698 (1996) and *Eaton Road Commissioners v. Schultz*, 205 Mich. App. 371, 376-377; 521 N.W.2d 847 (1994).[4]

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[4] In addition to the published opinions cited above, all citing the *Qualls* decision and none adding an "on the merits" requirements for collateral estoppel, numerous unpublished decisions citing *Qualls* have been issued, none of which add an additional "on the merits" element of collateral estoppel as Taylor Group asserts. Among those decisions are: *Tran v. Wayne State University*, Docket No. 208892, decided October 5, 1999; *Haener v. West*, Docket No. 203474, decided May 19, 1998; *Bancorp*

4. The Unpublished *Crumm* Decision Did Not Change The Established Law of Collateral Estoppel

Taylor Group cites the unpublished Michigan Court of Appeals decision in *Crumm v. Addison Community Hospital*, Docket No. 210980, decided December 17, 1999 to support its argument. *Crumm* did not effect a change in Michigan law.

Unpublished decisions of the Michigan Court of Appeals do not have precedential effect under the rules of *stare decisis*. Mich. Ct. R. 7.215(C)(1). *See also City of Detroit v. Qualls*, 434 Mich. 340, 360 fn 35; 454 N.W.2d 374 (1990); *Watson v. Michigan Lottery*, 224 Mich. App. 639, 648; 569 N.W.2d 878 (1997); *Scott v. Skotzke*, 216

Group, Inc v. Meister, Docket No. 174566, decided January 20, 1998; *Odd Christian Reme v. Jaques*, Docket No. 192257, decided September 2, 1997; *Reinhardt v. Rolling Green Corporation*, Docket No. 188499, decided August 1, 1997; *Lantis v. Hankinson*, Docket No. 187535, decided March 14, 1997; *Purdy v. Newland*, Docket No. 190310, decided February 4, 1997; *S. G. Cemetery Association, Inc. v. John Carlo*, Docket No. 128450, decided February 4, 1997; *New Genesis Missionary Baptist Church v. Presbytery of Detroit*, Docket No. 184650, decided December 6, 1996; *Centra, Inc. v. Jaffe, Raitt, Heuer & Weiss, P.C.*, Docket No. 181803, decided September 6, 1996; *Cummings v. Peisner*, Docket No. 181539, decided August 9, 1996; *Marazon v Monroe County*, Docket No. 182131, decided July 9, 1996. In addition to being available on Lexis, copies of these decisions are available at the Michigan Court of Appeals website www.courtofappeals.mijud.net. In the left hand column, click on "Court Opinions" in the "Resource Center" category. Opinions may be searched by text, segment or docket number.

Mich. App. 247, 251; 548 N.W.2d 695 (1996). If the panel had meant to render an important decision, recognizing a change in the law, it would have directed the opinion be published under Mich. Ct. R. 7.215(B)(3) because it "alters or modifies an existing rule of law."

The language in the *Crumm* decision reflects that the court was not being careful in distinguishing between *res judicata* and collateral estoppel in writing its opinion. The second and third paragraphs of the opinion describe the issue as being whether the trial court erred in dismissing the case on the basis of *res judicata*. It related the well-established elements of *res judicata*, including the need for an "on the merits" decision. The court then noted that there was a question about whether there was even a judgment which could be given *res judicata* effect. The court wrote:

> "[s]imilarly, while the parties appear to agree that a settlement was reached in *Crumm I*, the content and scope of that settlement agreement is not in the record presented to this Court. Accordingly, we are unable to determine whether the alleged settlement could be construed as barring plaintiff's claims against the *Crumm III* defendants."

The court went on to determine that the plaintiff was not collaterally estopped from bringing a medical malpractice action against the *Crumm III* defendants without stating whether either party had raised collateral estoppel as an issue. After repeating the long-established elements of collateral estoppel, the court, citing *Qualls*, wrote "because collateral estoppel requires that the issues have been actually determined, judgment on the merits must have been rendered in the first action to preclude re-litigation of the issues in the

second action." This is the only citation to *Qualls* that so provides and the statement is not a holding. The facts in *Crumm* reveal that no judgment at all was entered and that nothing was actually litigated and necessarily decided in *Crumm* – the Court of Appeals was not even sure that the case was settled. Since the historically recognized elements of collateral estoppel were not met, whether a new element would also be required could be nothing more than dicta.

The other case cited in the unpublished *Crumm* opinion is *Latimore v. William Mueller & Son, Inc.*, 149 Mich. App. 620, 640; 386 N.W.2d 618 (1986). That case does not contain an "on the merits" requirement for collateral estoppel. Rather, *Latimore* cites *Malesev v. Garavaglia*, 12 Mich. App. 282, 285; 162 N.W.2d 844 (1968) for the proposition that "a judgment must be rendered on the merits before it may constitute a bar to any subsequent claim." *Malesev* is a *res judicata* (claim preclusion) case and an "on the merits" decision is required for the broader preclusive effect of *res judicata*.

Under Michigan law, claims that were or could have been raised (without regard to whether they were necessarily litigated or actually decided) are barred if the requisites of *res judicata* are met. Collateral estoppel more narrowly bars the re-litigation of issues which must have been necessarily litigated and actually decided if its different elements are established. Nothing in *Crumm* or *Qualls* suggests a merger of the two different doctrines. There is no reason to give the rather sloppy analysis in *Crumm* a precedential effect when even the judges who signed the opinion decided that it should not be published.

The Sixth Circuit applied the correct rules of Michigan collateral estoppel law when it affirmed the trial court on this

ground. Review by this Court is not needed and the Petition should be denied.

B. THE SIXTH CIRCUIT HAD MORE THAN AMPLE BASIS TO AFFIRM THE DISTRICT COURT'S DECISION NOT TO ALLOW PLAINTIFFS TO FILE ANOTHER AMENDED COMPLAINT

Taylor Group concedes that the decision whether to allow a Third Amended Complaint (which actually would have been the fourth complaint filed in the federal court case) is commended to the trial court's discretion. Under all the circumstances of this case, the Sixth Circuit properly recognized that the decision to deny leave was a valid exercise of that discretion. There is no unsettled rule of law or procedure, no issue of public importance and no other reason that Court should grant the Petition to review that decision.

As a preliminary matter, this Court should recognize that only the decision with regard to the second filed proposed Third Amended Complaint (dated June 9, 1997, docket number 88) was properly before the Sixth Circuit and eligible for review by this Court. In September, 1995, Taylor Group voluntarily dismissed all defendants except for ANR named in the First Amended Complaint it was permitted to file. This was done for tactical reasons so that Taylor Group could have an immediate appeal of right to the Sixth Circuit Court of Appeals from Judge Gibson's original dismissal of its case on the basis of *res judicata*.[5] Thus, the consequences of

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[5] While that appeal was pending, the Michigan Supreme Court reversed the trial court's decision and reinstated the state court action against Defendant ANR. There is no argument that the

dismissing the First Amended Complaint were voluntarily assumed solely by Taylor Group.

The decision to strike the Second Amended Complaint (which had been filed without leave of the court, in contravention of Fed. R. Civ. P. 15(a)) and to deny leave to file the first Third Amended Complaint cannot be heard by this Court either. The magistrate judge's decision to strike the Second Amended Complaint (R.79 Order, dated April 11, 1997) was not appealed to the district judge. Taylor Group's First Motion for Leave to File a Third Amended Complaint was filed April 30, 1997. (R.80) It was denied by the magistrate judge by Order entered on July 2, 1997 (R.99 Order) after a hearing held May 27, 1997. This decision was not appealed to the district judge. None of the magistrate judge's unappealed decisions were directly reviewable by the appellate court, so they are not preserved for potential review by this Court. *See Mickler v. Nimishillen and Tuscarawas Ry. Co.*, 13 F.3d 184, 189 (6th Cir. 1993), *cert. denied* 511 U.S. 1084; 114 S. Ct. 1835; 128 L. Ed. 2d 463 (1994) and *Colburn v. Bunge Towing*, 883 F.2d 372 (5th Cir. 1989) applying this prohibition to a motion for leave to amend.

Taylor Group's second proposed Third Amended Complaint accompanied a motion filed shortly after the magistrate judge denied the earlier motion, on June 9, 1997. (R.88 Motion to Amend Complaint) It is the timing and substance of the proposed Third Amended Complaint, alone, that was the subject of the district court's decision and is the

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appeal of the state court decision would have or should have had any effect on continued prosecution of this case against defendants other than ANR, had Taylor Group not chosen to voluntarily dismiss those claims in 1995.

only subject on appeal, were the Petition for Writ of Certiorari to be granted.

The decision whether to grant a motion to amend rests within the sound discretion of the trial court. *FMB v. VanRhee*, 681 F. Supp. 1264 (W.D. Mich. 1987). The governing rule is clear and of long standing – a motion to amend complaint should ordinarily be denied where there is undue delay, **or** bad faith **or** dilatory motive on the part of the movant, **or** repeated failure to cure deficiencies by amendment previously allowed, **or** undue prejudice to the opposing party created by allowance of the amendment, **or** futility of the amendment. *Foman v. Davis*, 371 U.S. 178; 83 S. Ct. 227; 9 L. Ed. 2d 222 (1962) (emphasis added).

As to the allegations against ANR, the magistrate judge determined and Taylor Group agreed that the proposed Third Amended Complaint did not differ substantially from the First Amended Complaint, which Taylor Group voluntarily dismissed. (R.116 Transcript of Hearing regarding Plaintiffs' Motion to Amend Complaint, p. 27) By virtue of having filed the substantially similar First Amended Complaint months before its motion to amend, Taylor Group concedes delay and cannot now claim it was unable to seek the amendment requested in the Third Amended Complaint at any earlier time. Even in its Petition to this Court, Taylor Group does not offer any reason why amendment could not have been sought sooner.

Taylor Group's bad faith and/or dilatory motive was fully explained to the trial court. (R.91 ANR's Brief in Opposition to Plaintiffs' Motion to Amend Complaint, p. 4-6) In an effort to minimize the costs of this federal proceeding, the parties stipulated to using state court discovery in this case. (R.6 Joint Status Report, p. 4) As noted in ANR's

brief, "Extensive discovery has occurred in the parallel state court proceeding, including 23 lengthy depositions, 10 sets of interrogatories by Plaintiffs and 12 sets of requests for production by Plaintiffs in response to which ANR has copied over 8,000 pages for Plaintiffs." As ANR pointed out, while this state court discovery can be used in the federal action between Taylor Group and itself, "the new parties will understandably seek to repeat all such discovery, since they have not participated in the state court discovery." The magistrate judge agreed. (R.116 Transcript of Hearing regarding Plaintiffs' Motion to Amend Complaint, p. 31)

The magistrate judge was also fully aware that the delay was prejudicial to ANR (and the other defendants who were sought to have been added) because a material witness, S. Harold Stocker, a previously dismissed RICO "person" defendant (R.50 First Amended Complaint, ¶ 53) and the author of one of the alleged mail frauds (R.50 First Amended Complaint, ¶ 62f and Exhibit N thereto), had died during the pendency of the proceedings. (R.84 Brief in Support of Amoco's Response to Plaintiffs' Motion for Leave to be Allowed to File Third Amended Complaint, p. 4)

ANR also argued at the trial court level that Taylor Group seemed intent upon protracted, expensive and time consuming litigation in this case – perhaps in an effort to coerce settlement. The magistrate judge inquired of counsel for Taylor Group, who offered no excuse for splitting its claims arising out of the same facts or occurrences. (R.116, Transcript of Hearing regarding Plaintiffs' Motion to Amend Complaint, pp. 17-19) Taylor Group could have brought its RICO claim in the state court proceeding, but chose not to do so. Even when Taylor Group did seek leave to file an amended complaint in the state court action, it did not seek to add the RICO claim. (R.116, Transcript of Hearing regarding

Plaintiffs' Motion to Amend Complaint, p. 19, lines 1-4) Thus, Taylor Group clearly wanted a second bite at the apple, before a second tribunal, to decide its single claim. This second bite was properly denied.

Taylor Group's Motion for Leave to Amend was originally denied by the magistrate judge. (R.102 Order) This decision was affirmed by the district judge after consideration of the same arguments that Taylor Group raised at the Sixth Circuit level and that it included in its Petition to this Court. (R.105 Memorandum Opinion and Order) As the district judge noted, the magistrate judge correctly considered the prejudice to ANR that was a consequence of Taylor Group's undue delay and did not deny the motion on the basis of delay alone. (R.105 Memorandum Opinion and Order, p. 2) The magistrate judge correctly considered the general rule of liberal pleading amendment and the required duplicative discovery, as well as the importance of this matter to Taylor Group. *Id.* This is not a situation, as in *Janikowski v. Bendix Corp.*, 823 F.2d 945 (6th Cir. 1987), the only case discussed by Taylor Group, where there was delay without prejudice.

Both the magistrate judge and the district judge fully considered all of the relevant factors under the correct rule of law and exercised their discretion in a permissible manner. That decision was properly affirmed by the Sixth Circuit and need not be reviewed again by this Court. As stated in U.S. Supreme Court Rule 10, a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

CONCLUSION

For the reasons stated herein, ANR Storage Company respectfully requests that the Court deny the Taylor Group's Petition for a Writ of Certiorari. The Sixth Circuit ruled correctly and the issues raised in this case do not warrant this Court's attention.

Respectfully submitted,

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Dated April 26, 2002

APPENDIX M

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 1:94-CV-600

[Filed June 2, 1995]

THE TAYLOR GROUP et al.,)
Plaintiffs,)
)
v.)
)
ANR STORAGE COMPANY,)
a Michigan Corporation,)
Defendant.)
)

JUDGES:
BENJAMIN F. GIBSON, U.S. DISTRICT JUDGE

OPINION BY:
BENJAMIN F. GIBSON

OPINION

Defendant renews its dispositive motion based on prior adjudication. The Court incorporates by reference its Opinion

of January 31, 1995, in which it denied, without prejudice to renew, defendant's motion for summary judgment based on prior adjudication.

In that opinion, the Court found, based on the then current state of discovery and briefing, that claim preclusion did not bar plaintiffs' action because it appeared that an issue of material fact existed "as to whether plaintiffs could have presented their RICO claim in the state action." Opinion at 7. Plaintiffs had argued that they only learned of the necessary elements for their RICO claim during discovery in the state case and that the state trial court would not allow them to amend their pleadings to assert it. Upon defendant's further briefing, it now appears that no genuine issue of material fact exists as to these issues and that defendant is entitled to summary judgment in its favor.

A.

Under Michigan law, *res judicata* or claim preclusion prevents a plaintiff from litigating a claim that actually was litigated or could have been litigated in an earlier proceeding. *Katt v. Dykhouse,* 983 F.2d 690, 693 (6th Cir. 1992); *Eliason Corp. v. Bureau of Safety & Regulation of Michigan Dep't of Labor*, 564 F. Supp. 1298 (W.D. Mich. 1983); *Gose v. Monroe Auto Equipment Co.,* 409 Mich. 147, 294 N.W.2d 165 (1980); *Carter v. Southeastern Michigan Transp. Authority,* 135 Mich. App. 261, 351 N.W.2d 920, 921 (1984). Claim preclusion requires that: (1) the cause of action of the first and second suits must be the same; (2) the parties or their privies must be the same; and (3) the prior judgment must be on the merits. *In re Pardee*, 190 Mich. App. 243, 248, 475 N.W.2d 870, 873 (1991). A prior state court

adjudication has the same effect in federal court as it would in state court. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 379, 84 L. Ed. 2d 274, 105 S. Ct. 1327 (1985); *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 79 L. Ed. 2d 56, 104 S. Ct. 892 (1984).

In *Tafflin v. Levitt*, 493 U.S. 455, 107 L. Ed. 2d 887, 110 S. Ct. 792 (1990), the Supreme Court held that state courts have concurrent jurisdiction over civil claims under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*

B.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 601 (6th Cir. 1988). In ruling on a motion for summary judgment, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether the evidence is so one-sided that one party must prevail as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

C.

Based upon defendant's further briefing and identification of supporting documentary evidence, it now appears that all the elements of claim preclusion are satisfied and plaintiffs' RICO action is barred. Certain issues now appear incontrovertible. Plaintiffs' RICO claim arises in part out of the same cause of action as their state law fraud claim.[1] Also, the parties in this action and the state court action are the same or at least in privity. Further, the state court judgment was with prejudice and on the merits.

Several other matters no longer present genuine issues of material fact. Previously, the Court had recognized a

---

[1] Plaintiffs assert that this Court held that a genuine issue of material fact exists as to whether plaintiffs' state law fraud and RICO claims arise from the same occurrence or transaction. This Court actually stated that:

> Although plaintiffs' RICO claim arises in part from the same misrepresentations of defendant as alleged in plaintiffs' state court action, plaintiffs contend that they were unable to bring their RICO claim because they learned necessary elements only during discovery in the state case and the trial court did not allow them to amend their pleadings to assert it.

Opinion at 6. Although plaintiffs' RICO claim includes allegations of defendant's fraudulent representations to other mineral interest owners, as to plaintiffs, both their state law fraud and RICO claims are based on the same cause of action -- defendant's allegedly fraudulent representations to them.

genuine issue as to whether plaintiffs could have presented their RICO claim in state court. Opinion at 7. It is now clear that plaintiffs knew of the factual basis for their current RICO claim and had used it to respond to a dispositive motion in the state court action. In state court, plaintiffs argued that:

> It is now obvious from defendant's prior conduct in acquiring mineral interests in other gas storage projects that it knew full well that it had substantially underpaid plaintiffs and was now trying to relieve itself of its own fraud.

Brief in Support of Plaintiffs' Response to Defendant's Motion for Summary Disposition, at 15-16 (Exhibit B to ANR Storage Company's Reply to Plaintiffs' Response to ANR's Renewed Motion for Summary Judgment). Plaintiffs also detailed the disparity between defendant's representation to the sellers of the amount of remaining recoverable gas condensate and the amount actually produced. *Id.* at 16-17. This is the same information that plaintiffs now use as the factual predicate to establish the pattern of racketeering activity required for their RICO claim.

Also, it is now clear that plaintiffs had time to amend their complaint to raise this issue, had they chosen to do so. Plaintiffs have stated, in briefing to this Court, that their "RICO claim against ANR Storage Company accrued in May of 1993 at which time Plaintiffs discovered the pattern of racketeering activity and a similar scheme in regards to other storage fields." Brief in Support of Plaintiffs' Response to Defendant ANR Storage Company's Motion to Dismiss and/or Summary Judgment, at 16. However, the state court

did not dismiss plaintiffs' complaint until February 7, 1994. Further, as plaintiffs state in their brief on appeal in the state court action, in "response to Defendant's motion and brief for summary disposition Plaintiffs requested that they be allowed to amend their complaint." (Plaintiff-Appellant's Brief on Appeal at 37, Exhibit A to ANR Storage Company's Reply to Plaintiffs' Response to ANR's Renewed Motion for Summary Judgment.) There is no genuine issue of material fact that during the period from May 1993, when their RICO claim accrued, to February 7, 1994, when their state law fraud claim was dismissed, plaintiffs had time in which to move to amend their complaint and add a RICO claim. However, plaintiffs simply did not do so.

Plaintiffs further contend that they were unable to amend their complaint to plead a RICO action in the state court because it would have been futile. They assert that they were procedurally prevented from filing a RICO claim because of the Michigan Supreme Court's "tender back" rule in *Stefanac v. Cranbrook Educational Community*, 435 Mich. 155, 458 N.W.2d 56 (1990), which was the basis for the dismissal of their state law fraud claim. Plaintiffs' claim that a motion to amend their complaint to add a RICO claim would have been futile is not persuasive. As noted above, state courts have jurisdiction over civil RICO claims. *Tafflin*, 493 U.S. 455. Whether the state court would have applied the tender back rule of *Stefanac* to their RICO claim was never determined. Plaintiffs could have moved to add a RICO and argued that the state law tender rule does not bar a federal statutory RICO claim. Whether the tender rule applied then would have been determined, after any appeals, for purposes of issue preclusion. However, plaintiffs simply did not litigate their RICO claim, even though they could have.

D.

For purposes of claim preclusion, the Court finds that there is no genuine issue of material fact that: plaintiffs' cause of action in both the state and this federal case are the same; the parties or their privies are the same; the prior judgment was on the merits; and plaintiffs could have litigated their RICO claim in the prior state court action. Accordingly, the Court will grant defendant's motion for summary judgment.

/s/ _____
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: June 2, 1995

APPENDIX N

STATE OF MICHIGAN

IN THE 46TH CIRCUIT COURT FOR THE COUNTY OF KALKASKA

Case No. 93-4776-NZ (M)

THE TAYLOR GROUP, et al,
Plaintiffs,

vs

ANR STORAGE COMPANY,
Defendant.

DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE DENNIS F. MURPHY, CIRCUIT COURT JUDGE

Grayling, Michigan - Friday, August 22, 1997

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* * *

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this time. Thank you.

MR. DEVRIES: Thank you. Your Honor.
(court recessed at 11:39 a.m. and reconvened at 11:44 a.m.)

THE COURT: All right. In this matter the Defendants have filed a Motion for Summary Disposition alleging several grounds in support of why that motion should be granted, and also there has been filed a Motion to Dismiss based upon the statute of limitations, a (C)(7) motion.

Concerning the (C)(10) motion, the standard of law to be applied to that motion, which the Court is obligated to follow, is to determine whether there is factual support for the claim and giving the benefit of the reasonable doubt to the non-moving party resolving all factual matters in the plaintiff's favor. Whether there is a sufficient record to

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support the claim, and here we have a common law fraud claim, a misrepresentation claim, and more specifically it falls into that narrow category of cases concerning fraud by a seller in connection with the -

MR. ZIRNHELT: Fraud by purchaser, Your Honor?

THE COURT: -- fraud by purchaser in connection with the sale of mineral rights here in this case. As I mentioned in the prior opinion and order entered in this

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matter concerning a motion for a protective order, it is important to keep in mind that this is in that narrow category, again, of fraud being alleged on the part of purchasers in relation to their purchase of mineral rights from the Plaintiffs in 1983; and further it is necessary to examine the elements of that common law fraud claim in connection with the unusual circumstances where fraud is alleged -- or at least less common circumstances where fraud is alleged on the part of the purchaser, not the seller. That's the standard to be applied, and it is unfortunate that we couldn't have addressed this motion sooner as I would have preferred to have prepared a written opinion along the same lines that were completed in -- in this case back in March concerning the protective order. I always prefer a written opinion and order because it gives the Court more time to clearly and more succinctly state the basis for its ruling. However, here we do have a trial scheduled next week, so if a little bit of this ruling appears unconnected it's only because we don't have the benefit of being able to write and make revised drafts.

The question, then, boils down under that directed verdict standard, whether there is genuine issue of disputed fact concerning those specific elements of this claim, that of common law fraud, and more narrowly fraud

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where it's alleged on the part of the purchaser of, in this case, of real property interests. It is a strict standard and the Court does not lightly grant summary disposition, but it is required to do so under the rules where there simply are no facts in dispute which could support the claim. In other words, it would be -- it would be inappropriate to send a case to a jury where there are simply no jury questions of fact concerning the claim, and here we have a count of common law fraud, and the facts preceding this motion, I believe, are set out very clearly in the Supreme Court's prior opinion, number one. In addition, number two, additional facts are referenced in the Court's March, '97 opinion. I incorporate each of those opinions, the Supreme Court's opinion and this Court's opinion, into this ruling. In addition, I have reviewed voluminous materials here, all of them, and they include the affidavits, exhibits, excerpts of depositions and other attachments such as deposition exhibits. I will reference additional facts where appropriate as I go through the various issues with respect to the motion.

First of all, the -- the first issue is whether in connection with this offer to purchase made by the purchasers, Defendant ANR, for Plaintiffs' mineral rights -- the question is, was there any legal duty on the part

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of Defendant, ANR, the purchasers, again that needs to be emphasized and understood by all parties, that they were contemplating or may in the future have undertaken to use the property that would be conveyed by Plaintiffs' mineral deed

for a gas storage operation which would then enhance the quantity of condensate that they would recover through other than -- through means other than that which had been used to produce minerals up to June of '83 when they decided to sell their mineral rights. I believe the law in Michigan is very clear that there is no duty, was no duty on the part of ANR to disclose that fact that significantly more condensate would be removed if they were to use the reservoir for gas storage operations. I believe that law is very clearly set out in the appellate court cases and supreme court cases, and so that Plaintiffs could not -- cannot, I don't believe, premise a fraud claim upon alleged conduct which we'll accept as true that they withheld that information that there would be a significant amount of condensate extracted beyond what -- what otherwise was represented. That they're under simply no duty to do that in Michigan under Michigan law. I think that's -- and again, it needs to be again stressed that this is a fraud-by-purchaser complaint, and I quote from the *Zaschak* case, z-a-s-c-h-a-k, versus *Traverse Corp*, 123 Mich App 126,

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page 130, and I quote, "Michigan courts have not yet recognized a duty on the part of a vendee", purchaser as we have here which would be Defendant ANR, "... to disclose facts relevant to the value of the real estate in question...", here it would be facts relevant to the value of the mineral rights in question, "...even when specifically asked." We decline to promulgate such a rule -- excuse me, such a duty on the facts of this case. Although Plaintiffs claim that they would not have sold the mineral rights absent Faith's alleged concealment of facts and Faith, of course, was a defendant apparently connected with *Traverse Corp*, which

coincidentally happened to be Mr. Zirnhelt's client back in 1983, but that's not important, absent Faith's alleged concealment of facts the record discloses that plaintiffs received what was then accepted value for the rights, two hundred dollars per acre, but here's an additional and important observation of the Court in connection with their holding. Moreover, rather than obtain an independent appraisal of the property's mineral potential -- exactly what happened here -- plaintiffs relied upon Francisco, with whom they had previously settled, who assured them that two hundred dollars per acre was the going rate for mineral rights. I think that fact was significant to the court because it's part of their ruling. It follows

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their two holdings -- alternative holdings: one concerning whether they plead the case; and the second concerning even if it were plead the court goes on to state that, again on page 130, even though a question of fact could possibly -- possibly could exist on whether defendant Faith misrepresented the value of the mineral rights, which is what the allegation is here, summary judgment was properly granted because under any development of the facts, Faith had no recognized duty to disclose his alleged knowledge of the potential oil and gas activity in the area of plaintiff's land, and the court went on then to rule that, upon that basis, which would be a (C)(10) basis such as we have here, plaintiffs have failed to state a claim upon which relief could be granted, and I believe that's what we have, the same situation here. We have a situation where Plaintiffs, and again it needs to be recognized that Plaintiffs here are not selling a used car, they were not selling a -- a residential home. This was a sale involving mineral

rights which would, in any reasonable -- under any reasonable view of the facts, cause one to obtain an independent appraisal, just as was noted in the *Zaschak* case, particularly where the offer, referring to the letter and attachments to that letter which for the agreement, the mineral deed, the valuation statement,

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Attachment 1, the actual offer to purchase as set out and attached to the letter, states very clearly, quote,

> "In the opinion of buyer, the total of the cash payment, royalty checks to be received and contingent payments, if any, equals or exceeds the market value of the mineral rights which buyer is offering to purchase from seller."

Now that would be a red flag to any purchaser where it states "in the opinion of buyer". That gets to whether the element of a material fact has been presented but it also, I think, bears on the legal duty, and importantly here, unlike the case of *Gar versus Alden* where there was -- again was fraud by the purchaser alleged. There they were -- false statements were made to an infirm and elderly sellers which caused them to forbear or to decide to forego getting an independent appraisal on the value of standing timber on their property. There are no facts plead or alleged in this case that demonstrate in any way that ANR, the Defendant-Purchaser, either obstructed, hindered or suggested that Plaintiffs should not get their own appraisal. We are not dealing, further, with the infirm and elderly plaintiffs. This case involves Plaintiffs who were mineral rights owners for several years, and

furthermore, were mineral rights owners of a sufficient intelligence

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and intellect that triggered them to, at one point earlier, prior to this sale, to get an independent opinion on a prior offer, which they did and it was rejected. They simply didn't do so the second time around. They relied on others opinions that it looked like a good deal, and that's despite the fact that their basis for the amount used to calculate payments is presented to them as an opinion. Again, that's a red flag phraseology to any -- to any seller; to a purchaser, of course, let alone to a seller, which again has a slightly different duty under Michigan common law.

It's not a question of fact whether they should have gotten an outside report. I disagree with that conclusion. The question is whether there was anything done by Defendant to dissuade, hinder, obstruct Plaintiffs from obtaining an independent report, had they chosen to. I have to believe my observations in that regard are, again, supported not only by the appellate court and Michigan Supreme Court but by the observations of the author, Cameron, in his treatise "Michigan Real Property Law, Second Edition", Section 15.49. Again, as I stated, I don't take granting of these motions lightly, but I do feel I have a duty to follow the law and I believe it does require granting of the motion where we have a special category of common law fraud alleged, that

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of fraud by a purchaser, and the law, I believe, in Michigan is very clear on that point. At -- Viewing the facts in a light most favorable to the Plaintiff we have really what could best be alleged as a false opinion. Again, under Michigan law false opinions cannot form the basis of a common law fraud misrepresentation claim, and even if the Attachment 1 figures to the offer, again that's the third page of the -- of the offer package which is composed of the ANR letter which is really a solicitation to The Taylor Group, we're interested in buying, do you want to sell-type of offer, a cover letter, with an attached specific and detailed offer with an evaluation attachment to that, Attachment I or 1 – it's been referred to as both the letter "I" and Roman numeral "I", in these discussions, and attached to that is the mineral deed and other documents not forming the basis of the contract.

It is important to further note that the buyer was offering, ANR, the Defendant-Buyer or Purchaser, was offering to purchase "the mineral rights", not to purchase a fixed amount of gas or condensate, and that Attachment I, I must conclude is more of a schedule of how we're arriving at our figures, but the offer is clearly phrased to be -- clearly stated to be, it's not phrased, it's stated to be an offer to purchase all of

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their mineral rights, and the mineral deed, itself, states that Plaintiffs, when they signed the mineral deed after consulting with others, after reading the offer, and after not obtaining any independent appraisal, they then conveyed "all gas, oil

and other minerals" -- their rights to all gas, oil and other minerals in the Blue Lake 18A field. The Court's ruling would be different if this were a case where ANR was in a joint venture relationship, or special relationship, or that of producer-operator, or any other type of business relationship between the two, but here ANR is an outsider, a third party, they are not the operator of the field and therefore there's no basis in the law to invoke any special exception in this case, and this was done, as I mentioned, in the *Gar* case. Further they -- the Court's opinion would be different if "they" meaning ANR, were to have done anything to obstruct Plaintiffs from obtaining a independent appraisal and there's no evidence of that whatsoever. Further it should be noted that the Court's obligation not to say, well, does this appear to be a fair deal ten years later. Well, perhaps not and I personally believe that it's -- it's unclear whether it was or wasn't at that time a fair deal. I mean, even if it wasn't that's not the -- that's not the standard of review and that's not the question to be asked under the

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law.

It's interesting to further note that a federal district judge was presented with a very similar issue in connection with a motion for summary disposition and there are striking similarities in both the facts and the applicable law, though it's not specifically quoted as a Michigan law. The common law or rules followed by that district judge in connection with the fraud claim are very similar to that found in Michigan. That case is *Keasler v. Natural Gas Pipeline Co.*, 569 F Supp 1180, a 1953 case. It's a district court opinion from the

Eastern District of Texas and in that court's memorandum opinion he discusses a conversion claim, which I'm not going to discuss, but rather turn to the fraud section, and the court discussed the plaintiff's claim. They seek to recover for fraud and misrepresentation under three theories. They discussed federal securities, Texas fraud statute and the common law. While the particular elements of each theory vary somewhat as to proof -- I don't understand that word there -- "vary somewhat approve" it says, but anyway all the particular elements of each theory vary somewhat. The complaint alleges common acts of misrepresentation, and here is how the court summarized the defendant's alleged fraudulent misrepresentations. Not telling plaintiffs about likely

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future events: to-wit -- and this is just like this case -- future prospects for enhanced gas production in depleted fields, the likely production of quote, gas condensate, quote, from the injection and withdrawal of storage gas, just like we have here. The possibility that the field might produce longer than expected. Next, offering lump sum payments to plaintiffs for their interest without having itemized all the crucial facts. Again, this is all a part of the fraud claim. The price paid, the volume of gas in place purchased, the methods used to estimate the minerals remaining in place, the real value of the hydrocarbons, just as we have here, and they allege other fraudulent acts such as stamping the offer " non-negotiable", failing to tell these plaintiffs that they settled or compromised with others, but really focusing on what is alleged to be the misrepresentations they are very similar to exactly what we have here and that is that in years subsequent to '83 after this offer to purchase was accepted, the mineral rights conveyed,

the monies paid, they then -- "they" meaning ANR, the purchaser, then began using the field for a gas storage operation which as an incident or benefit of doing that they were able to extract additional condensate that's not typically extracted from non-gas storage means.

The district court judge in the federal court

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noted, as a general rule fraud consists of either a false representation of a past or present material fact or a false promise to do some future act. The concept of fraud includes acts of nondisclosure to the extent the law requires disclosure, however, it is a fact, not speculation as to the future that must be disclosed. In Michigan I believe we are -- we follow the rule that the fraud must allege to past or present facts. In that regard there's some difference, but the court goes on to note the first set of allegations that *Natural* committed fraud by failing to make predictions about the productive life of the reservoir -- very similar to what we have here, regulatory acts of Congress and federal agencies and the advancement of petroleum engineering is bazaar in the extreme, said the federal judge. Moreover, he states, even had *Natural*, the pipeline company, been prescient or had been able to predict the future it was under no duty to share its prognostications with plaintiffs. Apparently, again as here, the additional hydrocarbons and condensate were extracted beyond what would normally be extracted from non-gas storage cycling operations, and the court granted the summary disposition motion because of the fact that -- the court noted in its finding in denying the motion that plaintiffs complain -- this is a quote,

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> "Plaintiffs complained that *Natural's* offer of a lump sum payment for the gross value of their royalty interests was deceitful because the factors of volume and unit price were not disclosed."

The *Keasler's*, plaintiffs, suggest that had those factors been revealed they would have been aware of the quote, real value, unquote, of the hydrocarbons in place. Again, that's what the plaintiffs are saying here. In other words, *Natural's* offer to pay certain sums for the quote, gross value, unquote, of minerals remaining was fraudulent because the sum offered was, according to the plaintiffs, less than the minerals real value, and the court noted as follows, quote:

> "The court finds no precedent for penalizing one who offers his adversary less than the 'real value' in opening negotiations. Moreover, the hidden premise of plaintiffs' argument that the consideration was inadequate was originally plead but later abandoned as unproven. There is no credible evidence to show that the real value of the rights conveyed to Natural are other than the price paid."

And again, we have to examine this case the Taylor case, just as is true here in the *Natural Pipeline* case, you have to look at the value at the time conveyed and

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not what additional hydrocarbons or value of condensate might be extracted through the use of future gas storage operations. If the law were that a purchaser is under a duty tell the seller -- excuse me, yes, tell the sellers of all of the possible intended uses and benefits that sellers may be giving up in the future, if certain future events occur such as getting a gas storage operation in place, then we'd have a different situation, but that's not the law; and further, concerning the observation of the *Keasler* court at -- okay, here it is -- all right, the *Keasler* court further noted that when the facts are patent or when the plaintiff has equal opportunity for obtaining the information, which is what we have here, that he may be expected to utilize if he cares to do so, or when the defendant has no reason to think that the plaintiff is acting under misapprehension, there is no obligation to give aid to a bargaining antagonist by disclosing what the defendant has himself discerned. To a considerable extent, sanctioned by the customs and mores of the community, superior information and better business acumen are legitimate advantages which lead to no liability. That's essentially what we have here. The defendant may reasonably expect the plaintiff to make his own investigation, draw his own conclusions and protect himself, and if the plaintiff is indolent, inexperienced

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or ignorant, or his judgment is bad, or he does not have access to adequate information, the defendant is under no obligation to make good his deficiencies. This is the rule particularly applied to the purchaser's duty as opposed to a seller. Again, that distinction needs to be emphasized

throughout this ruling and, again, of course I do find -- have found as fact that there was nothing done to deter or dissuade or obstruct Plaintiffs from getting their own separate valuation and they had no duty to say to Plaintiffs, for example, well, you better not accept this offer because we are anticipating a -- pulling together a gas storage operation if the following four events occur, and it may occur in the future and if so your mineral rights may be worth ten times what they are now, but you may get that money five years from now or ten years from now. There's no duty upon Defendant to – to make such statements.

So, for those reasons the Defendant's motion is granted, and further, the Court should stress, too, that we have clearly written, it's in black and white, and it's called by Mr. Zirnhelt the "famous paragraph four" but I don't know that that type of whimsical reference gives it any less weight. It's still written, it's still there, it's still part of the offer and acceptance, it's still part of the contract and purchasers are being told

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directly -- sellers, excuse me, are being told by the purchasers this is our opinion. In Michigan, under Michigan law a fraud claim cannot be predicated upon an opinion. That's what we have here. It's an opinion as to what the value of their mineral rights are, and again, these are owners of mineral rights, which is a special area of the law. It's not difficult or overly complicated, it's simply different in that these are owners, The Taylor Group, are not owners of a used car or a residential home, they are owners of mineral right, who in the past have secured independent opinions from petroleum

experts and didn't do so in this case, and are very upset, understandably, about the appearance of a windfall being reaped by Defendant ANR. But the offer does state in paragraph four,

> "In the opinion of buyer, the total of the cash payment, royalty checks to be received and contingent payments, if any, equals or exceeds the market value of the mineral rights which buyer is offering to purchase from seller."

-- and what is buyer offering to purchase from seller? All of their mineral rights, not part of them. I should say, all of them in a certain formation, of course. I think they did exclude deep well formations, but that's not relevant to this case because here we're

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talking about the mineral rights to the formations that contain the condensate and it clearly says, "in the opinion of buyer". That -- There is no question of fact for the jury on that. It's an opinion. If there was a dispute as to whether that was an opinion or not, it would be a jury issue and the motion should be denied, but here it's clearly an opinion. There must be a material fact. That's an element required upon which a plaintiff can base a claim of fraudulent representation, but there must be a material fact. Here we don't have a material fact. We have an opinion. As noted in the Michigan law, a material fact cannot be an opinion, belief, speculation or prediction. It must relate to something past or present that can be proved or disproved, and the very first part of the jury

instruction on this issue, which I think is an accurate summary of the law, this is the most important phrase, "A material fact cannot be an opinion", and that's exactly what we have here, and far that reason alone, separate and apart from the other bases, the motion must be denied because there simply can be no proof of misrepresentation of a material fact when what was presented to Plaintiffs was an opinion as to the value. That's a separate grounds for granting the motion. Now, the statute of frauds issue, turning to the

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(C)(7) bases for the motion, is again a separate grounds upon which to grant Defendant's motion because there was no concealment of what type of operation was going to be run by ANR in that field. I believe the State of Michigan law now -- and I'm bound to follow that, I cannot make law or change law, I can only apply it -- and we have a situation here where -- where MCL 600.5827, MSA 27A.5827 reads as follows:

> "Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in Sections 5829 to 5838..."

-- and parenthetically it's noted that those sections concern various types of actions that do not include common law fraud, such as time periods concerning open account, a different limitation period for time -- right to make entries and recover possession of land, and common carrier actions, etcetera, so continuing on with the quote of the statute, "... and in cases not covered by these sections", which is what we

fall into, "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." Now, in this regard we're, of course, dealing with a six year statute of limitations period for common law fraud, and since the statute, which is again the

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controlling law in Michigan, provides that the claim accrues at the time the wrong upon which the claim is based was done, which is 1983. Since all the elements of the claim existed or accrued at that time, then this matter is -- was filed four years beyond -- approximately four years beyond the statutory period of six years.

If a discovery basis is used to calculate the statute, which I don't believe is current State of Michigan law, then the question is when did Plaintiffs discover or when would Plaintiffs -- when should Plaintiffs have reasonably discovered the fraud, and in that regard, again, it was no secret that there was contemplated this gas storage operation, if that can be a basis for fraud. Again, you have to take that first, and we have opinion -- essentially opinions rendered and not facts. So, assuming all of the allegations of Plaintiffs claim are true it's important to note that –

(Pause)

-- it's important to note that even prior to June of '83, Plaintiffs were -- at least one of the primary Plaintiffs who could be called a Taylor Group representative, was informed by their own expert in 1980 that as concerns the value -- Petroleum Engineering Report -- let me get the exact title

here, discussion of future production of reserves from the Blue Lake 18A

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field, Kalkaska County, this is an attachment to the -- to Defendant's motion which is offered as an admission of Plaintiffs, in essence --

MR. ZIRNHELT: Your Honor, so the record is clear could you give the party who signed that and the date of it and –

THE COURT: I'm doing that. I'm looking for it right now.

MR. ZIRNHELT: okay, thank you.

THE COURT: Yes, sir. Titled Evaluation of Harold Snyder Interest in AMOCO State Blue Lake Unit "L" Well 317. It's signed by Charles Brown, Petroleum Consultant, August 19, '80, and that's the cover sheet. Attached to it is a letter to Michael Hoey, President, Mineral Management Services, P O Box 792, Traverse City, and it concerns -- is says, Re: An Appraisal of Royalty Interest Owned by Harold Z. Snyder in the AMOCO State-Blue Lake Unit "L" Well, 3-17, Kalkaska County. It's signed by Charles Brown and attached to that, as I said before, is a discussion -- it's titled Discussion of Future Production of Reserves from the Blue Lake 18A, 28 North, 5 West field, Kalkaska County, Michigan. I don't know the tab number on your brief where this was included, Mr. DeVries. Do you know the tab number on that?

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MR. DEVRIES: Tab four, Your Honor.

THE COURT: Tab four, all right. It states right in that report from the petroleum consultant that -- and again, it's common -- it's been established that these various Plaintiffs shared various information amongst themselves, these Taylor Group Plaintiffs, and here's report which states on the last page, after going through the various calculations, and this is underlined by the -- apparently by someone -- and it appears to be as part of the report -- it is important that the royalty owners remember this possibility in giving any future lease for gas storage purposes, and the possibility he's referring to is the following: no consideration was indicated as given to any cumulative condensate production in balance to date for each well, paren, or for the entire reservoir, paren, or the effect that change in the gas allowable production scheme might have on the future condensate to be recovered from each well, paren, or the entire reservoir, close paren. It is anticipated that the operator, paren, AMOCO, close paren, may not be too concerned about low condensate recovery during the gas production phase of the reservoir, comma, but may be expected to retain its rights to any liquid recovered from possible use of the reservoir as a gas storage field in the future, period. That's allowed by: It is

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important that the royalty owners remember this possibility in giving any future lease for gas storage purposes. That was in 1980, again, knowledge Plaintiffs had as to that possibility

and the fact that that significantly -- could significantly alter the value of the rights which they held.

Now, the question, when they reasonably should have discovered the alleged fraud? If you take the fraud alleged as true, and again we cycle right back and that's why I have a difficulty with this statute of limitations point, it's gets right back to the point this is alleged fraud based on an opinion, and therefore, there is no common law fraud, and further, as I mentioned before, it's fraud upon the part of a purchaser and, as I mentioned before, there was no duty for the purchaser to disclose every bit of knowledge concerning the potential value of that condensate in the future to the sellers, but accepting all that as true, could they have discovered that alleged fraud? Apparently it's -- it appears to the Court very clear that this existence of additional condensate being extracted by future gas storage operations was something that could have been discovered easily through the exercise of any type of reasonable or due diligence. That being the case, even applying the discovery rule, Plaintiffs claim -- the

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complaint, I should say, has been filed too late. Even applying the discovery rule and not the statutory cause of action accruable.

MR. ZIRNHELT: Your Honor, could I make an inquiry? Does that ruling only apply to the parties who had access to that particular document?

THE COURT: Well, no, no, because it's very clear from the record here in viewing the affidavits, exhibits, and

so forth, that the production from that and other – as been mentioned, other wells, is a matter of public record. They are filed with the State, those figures, and they could have discovered it very early on through the exercise of due diligence and that would apply to all Plaintiffs, and I find that they -- the rules is the same regardless of which Plaintiff you were talking about.

MR. ZIRNHELT: I was talking about that report, Your Honor. I'm just trying to get a sense of what the -- what the impact of that report was in your ruling.

THE COURT: Well, the impact of the report, I should clarify, is really minor. It's just another factor showing that in 1980 there was some knowledge -- or the use of a report, and some knowledge of -- that there's an issue concerning use of their properties for gas storage operations. In other words, Plaintiff, Taylor Group, was not ignorant, at least not even in

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1980, of the possible additional condensate value if there is a gas storage operation put into that property in the future.

MR. ZIRNHELT: Your Honor, that's why I raised the issue. That's The Snyder Group who had the access to that particular memo, not The Taylor Group. That's why I raised that issue.

THE COURT: All right, but I -- It's been pretty clearly set out in this litigation by way of -- of the complaint, depositions, affidavits, etcetera, that these groups freely shared their information, and that fact is why we have a claim

by all the Plaintiffs that they were defrauded because other -- the original fraud information apparently was relayed to the other Plaintiffs.

All right, let me continue on. The Michigan Supreme Court has not yet applied the discovery rule to common law fraud actions but if it is applied, again it appears that the statute of limitations would still bar the complaint. That's again -- that's a separate bases to grant the motion independent from the (C)(10) grounds.

As to whether the court rule would require that this case be dismissed -- well, as to whether the court rule would require that the Court dismiss this matter because there is a substantially similar claim pending against the same Defendants in federal court, I'll

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reserve ruling on that. There's no clear direction in the case law on that and I don't know that it's even necessary for me to give a third bases to grant the motion. I would note that 2.116(C)(6) reads as follows: The motion, and again of course referring to a summary disposition motion -- I'm reading (C), grounds -- the motion may be based on one or more of these grounds. It must specify the grounds on which it is based. Number six, another action has been initiated between the same parties involving the same claim. Well, at this juncture it should be noted that there is a RICO complaint filed in the, I believe it was the Western District of Michigan, I don't have a copy of it in front of me, and that -- that complaint I believe came after this. Is that correct, counsel?

MR. ZIRNHELT: That's correct, Your Honor.

THE: COURT: Do you agree with that?

MR, DEVRIES: I do, Your Honor.

THE COURT: The federal claim was filed after this state suit?

MR. DEVRIES: Correct.

THE COURT: Ali right. The rule reads, another action has been initiated between the same parties involving the same claim. All right, well, I'm not going to rule on that. I don't think it's necessary. We'll

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leave that issue unresolved.

THE COURT: All right. All right, you can prepare an order?

MR. DEVRIES: I will prepare an order, Your Honor.

MR. ZIRNHELT: Could I have a couple clarifications, please, for the record?

THE COURT: Well, I need to take a break at this time.

MR. ZIRNHELT: Okay.

THE COURT: Thank you.

MR. ZIRNHELT: You'll be back, Your Honor?

THE COURT: Well, let's go off the record and you can ask what you want. Why don't you come back here.

MR. ZIRNHELT: Okay.

(Proceedings concluded at 12:46 p.m.)

APPENDIX O

STATE OF MICHIGAN

COURT OF APPEALS

No. 206534
Kalkaska Circuit Court
LC No. 96-004776 NZ

Unpublished July 13, 1999

The Taylor Group, an Indiana Generala)
Partnership, Charles K. Newman, Stephen R.)
Newman, Marilyn Dodds, Christine Newman)
Aumiller. Irma Newman, Keith Dempsey,)
Carolyn M. Dempsey, Roland J.W. Linder,)
Estate of Ruth Dempsey, Deceased, Narlyn D.)
(Dempsey) Vinyard, Basil Dempsey, Bryna M.)
Dye, Winifred Y. Blossom, Ray Bullock, Kris A.)
Bullock, Jeanne L. Bullock, Jack L. White,)
William J. White, Carol Janeharshman, Dee Ann)
Peterson, Ken A. Stoops, Sheryl L. White,)
Robert L. & Betty J. Stoops Charitable Remainder)
Unitrust, Christine M.(Neideck) Weiss, Steven P.)
Neideck, Robert R. Neideck, Jr. Margaret C.)
Neideck, Robert R. Neideck, Lawrence N.&)
Marie E. Williamson, Estate of Virgil Burkholder,)
Deceased, Alison M. Burkholder, Carolyn Rose)
Burkholder, Joleen M. (Burkholder) Hurt)
Tim Burkholder, Estate of John Ayers, Deceased)

John S. Burd & Patricia A. Burd, Jim Mathis, Paul Nussbuam, Kurt Evan Bullock, Elmer Nussbaum, Jeffrey Dempsey, Erica L. (Dye) Dyeson, Harold and Ellen Snyder, James A. Snyder, Marian S. (Snyder) Willey, The Harold & Ellen Snyder Charitable Remainder Unitrust (Trustee-Spring Arbor College); The Harold & Ellen Synder Charitable Remainder Unitrust (Trustee-Free Methodist Foundation), Ruth E. White, Clarence A. Synder, and Arthur H. Snyder,

Plaintiffs-Appellants,

vs.

ANR STORAGE COMPANY,

Defendant-Appellee,

Before: Murphy, P.J., and Doctoroff and Neff, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's decision to grant summary disposition in favor of defendant. We affirm.

The trial court granted summary disposition in favor of defendant on several alternative grounds; however, because the trial court correctly decided that plaintiffs' complaint was barred by the applicable statute of limitations, our review of plaintiffs' other issues is unnecessary.

In March 1983, plaintiffs, a group of individuals associated with Taylor University in Indiana, were contact by defendant regarding the purchase of plaintiffs' mineral rights. Defendant is engaged in the business of storing natural gas. Defendant informed plaintiffs that it was interested in purchasing each plaintiff's pro-rata share of mineral rights in Blue Lake 18A Field, a tract of land in Kalkaska County, for the purpose of developing a natural gas storage facility. At that time, Amoco Production Company was operating Blue Lake 18A Field, and plaintiffs were receiving royalties from Amoco in exchange for drilling rights. The field was producing both natural gas and natural gas condensate, a valuable liquefied form of natural gas.

Following negotiations, plaintiffs agreed to sell their mineral rights to defendant for a price calculated by using defendant's estimate of the remaining value of those rights. Specifically, in exchange for the mineral rights, defendant agreed to pay plaintiffs a sum based on the remaining gas in the field as of June 1, 1983. In the early 1990s, plaintiffs came to believe that they had been defrauded by defendant with respect to defendant's representation regarding the volume of natural gas condensate remaining in Blue Lake 18A Field in June 1, 1983. On January 14, 1993, plaintiffs filed this suit, alleging that defendant had been "either intentionally false and incorrect, or negligently false and incorrect" in representing the volume of natural gas condensate remaining in the ground in June 1983. In its answer to plaintiffs' complaint, defendant offered the affirmative defense that each plaintiff had accepted a cash payment in exchange for the execution of a release of all obligations arising out of the representation made by defendant in connection with the sale. Defendant later moved for summary disposition on the basis

of the release. The lower court granted the motion, and this Court affirmed the decision of the lower court in *Taylor Groula et al v ANR Storage Co,* unpublished opinion per curiam of this Court, issued March 27, 1995 (Docket No. 173259). Our Supreme Court however, reversed this Court's decision in *Taylor Group v Storage Co*, 452 Mich 561; 550 NW2d 258 (1996), and remanded the case to the trial court for further proceedings. On remand, the trial court again dismissed plaintiffs' case. Plaintiffs now appeal from that dismissal.

Plaintiffs argue that the trial court erred in dismissing their case on statute of limitations grounds because there were genuine issues of material fact with regard to whether they knew or should have known that they had a cause of action for common law fraud against defendant six years before they filed their complaint.

The parties agree that the applicable statute of limitations for claims of common law fraud or misrepresentation is MCL 600.5813; MSA 27A.5813, which provides that "[a]ll other personal actions shall be commenced within the period of six years after the claims accrue and not afterwards unless a different period is stated in the statutes." If the common-law discovery rule applies a claim accrues, for limitation period purposes, when the plaintiff discovers, or through the exercise of reasonable diligence should have discovered (1) an injury and (2) the causal connection between the injury and the defendant's breach of duty. *Lemmerman v. Fealk*, 449 Mic 56, 66; 534 NW2d 695 (1995). Plaintiffs filed their complaint in this case on January 14, 1993. Therefore, assuming without deciding that the discovery rule applies to plaintiffs' cause of action, if plaintiffs discovered or

through the exercise of reasonable diligence should have discovered that they had a cause of action against defendant for fraud sometime before January 14, 1987, the cause of action is time-barred.

This Court reviews a trial court's grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo to determine whether the moving party was entitled to judgment as a matter of law. *Huron Tool & Engineering Co. v. Precision Consulting Services, Inc.* 209 Mich App 365, 376-377; 532 NW2d 541 (1995). This Court must accept as true the plaintiffs well-pleaded allegations, construing them in plaintiff's favor. *Id.* After examining the pleadings, affidavits, or other documentary evidence, if there are no genuine issues of material fact, whether the plaintiff's claim is barred by the statute of limitations is a question of law for the court. *Id.* However, if a material factual dispute exists, such that further factual development could provide a basis for recovery, summary disposition is inappropriate. *Id.*

After examining the record in this case, we agree with the trial court that through the exercise of reasonable diligent, should have discovered that they had a cause of action against defendant for fraud sometime before January 14, 1987, and thus the trial court did not err in dismissing plaintiffs' complaint pursuant to MCR 2.116(C)(7). The record in this case reveals that in June 1983, defendant extended an offer to purchase plaintiffs' mineral rights in Blue Lake 18A Field. As part of this offer, defendant specifically represented to plaintiffs that, as of June 1, 1983, Blue Lake 18A Field contained 45,170 barrels of remaining natural gas condensate, which was later adjusted to 51,816 barrels pursuant to the terms of the contract.

Plaintiffs contend that in late 1991, a friend of a partner of the Taylor Group advised the group that he had information that defendant had significantly understated the amount of natural gas condensate remaining in Blue Lake 18A Field. In response to this information, and at the suggestion of counsel, plaintiffs retained an expert to evaluate the volume of natural gas condensate, as well as the volume of secondary gas condensate subject to future recovery, that was remaining in the field on June 1, 1983. Gary Way, an expert engaged in petroleum engineering, estimated that the natural gas condensate remaining in the ground and subject to recovery as of June 1, 1983, was not 51,816 barrels as represented by defendant, but significantly greater.

In moving for summary disposition, defendant contended that plaintiffs' experience in the oil arid gas business should have caused them, like any reasonably prudent seller of property, to seek the advice of both counsel and experts before accepting defendant's offer to purchase plaintiffs' mineral rights. Defendant also relied heavily on a 1980 report created for plaintiff Harold Snyder regarding the value of the mineral rights in another gas field in which he owned an interest. In this report, Charles Brown, a petroleum consultant, alerted Snyder to the possibility that the use of a natural gas field for storage purposes could generate secondary natural gas condensate and that royalty owners should consider the potential for such secondary condensate recovery in negotiating the sale of mineral rights. Further, plaintiff Harold Snyder admitted in his deposition in this case that the information regarding the potential for secondary condensate in Blue Lake 18A Field was available in 1983 had he asked for it.

Plaintiffs responded to defendant's motion by arguing that in negotiating the sale of their mineral rights to defendant, plaintiffs justifiably relied on the oral representations of Donald Ross, an agent of defendant, who represented that the terms of the contract required defendant to compensate plaintiff, for all the natural gas that was remaining in Blue Lake 18A Field. Plaintiffs contended that Ross' representation regarding the terms of the contract induced them not to obtain an independent assessment of the volume of natural gas condensate remaining in the field on June 1, I983.

We agree with the trial court that plaintiffs, through the exercise of reasonable diligence, should have discovered that they had a cause of action against defendant in June 1983. Even assuming that defendant perpetuated some type of fraud upon plaintiffs, the exercise of reasonable diligence should have exposed that fraud in June 1983. If the volume of natural gas condensate remaining in the field was available to defendant in June 1983, then it must also have been available to plaintiffs. In fact, plaintiffs do not deny this, but contend that the representations of Donald Ross, referenced above, induced them not to seek an independent appraisal of the value of their own mineral rights. Although this might be true, the question is not whether plaintiffs were actually induced by Ross not to verify the accuracy of defendant's estimate of the value of plaintiffs' mineral rights, but, rather, whether their reliance on Ross' representations was reasonable under the circumstances of this case. In our opinion, the exercise of reasonable diligence should have caused plaintiffs to seek an independent appraisal of the volume of natural gas condensate remaining in their own property, notwithstanding the representations of Ross.

Accordingly, the trial court did not err in concluding that the statute of limitations barred plaintiffs' cause of action. In light of our resolution of this case, we need not reach plaintiffs' remaining issues.

Affirmed.

/s/_____
William B. Murphy

/s/ _____
Martin M. Doctoroff

/s/ _____
Janet T. Neff